

JEREMIAH W. (JAY) NIXON,
Attorney General,
Plaintiff,
v.
Walgreen Co.
300 Wilmot Road
Deerfield, Illinois 60015
serve: The Prentice-Hall Corp. Sys. Inc.
221 Bolivar Street
Jefferson City, MO 63101
Registered Agents

The Attorney General brings this action pursuant to RSMo § 407.020 *et. seq.*, and in support states:

Parties and Jurisdiction

1. Jeremiah W. (Jay) Nixon is the duly elected and acting Attorney General of the State of Missouri.
2. Walgreen Co. is a for-profit Illinois corporation in good standing with its principal place of business in Deerfield, Illinois. Walgreen Co. is authorized to do business in Missouri as a registered foreign corporation.
3. Walgreen Co. operates business establishments in the State of Missouri, including establishments within the City of St. Louis. Those establishments offer for sale to the public various tobacco products.

4. This Court has subject matter jurisdiction over this action pursuant to § 407.100, RSMo 1994.

5. This Court has personal jurisdiction over Walgreen Co. because Walgreen Co. is registered to do business in Missouri, has transacted and continues to transact business within the State of Missouri, and because all acts giving rise to the cause of action described in the petition took place within the State of Missouri.

6. Venue is proper in this Court pursuant to § 407.100.7, RSMo 1994 and/or §§ 508.010 and 508.040, RSMo 1994 because one or more of the acts which are alleged to violate § 407.020 occurred in this judicial circuit and because Walgreen Co. transacts business within this circuit.

Background on Tobacco and Youth

7. According to the Federal Food and Drug Administration, more than 80% of tobacco users began their habit before the age of 18.

8. According to the Federal Food and Drug Administration, the average adolescent tobacco user begins to smoke at 14 & 1/2 years of age and becomes a daily smoker before the age of 18.

9. According to The Campaign for Tobacco Free Kids, 27,000 Missouri children under the age of 18 become new daily smokers each year.

10. According to the Federal Food and Drug Administration, of the 3000 young people throughout the United States who become regular smokers each day, nearly one-third will have their lives shortened by tobacco-related diseases.

11. According to the Institute for Health Policy of the Heller Graduate School at Brandeis University, most adolescent smokers purchase tobacco products at retail stores, even though the sale of tobacco products to a minor is prohibited in every state.

12. Since 1992, §§ 407.931.1 and 407.931.2, RSMo have made it illegal in the State of Missouri to sell or distribute tobacco products to persons under the age of 18 years.

13. Beginning in 1998, the Missouri Department of Mental Health, Division of Alcohol and Drug Abuse ("DMH"), in conjunction with the federal Food and Drug Administration ("FDA"), conducted compliance checks on establishments selling tobacco products to ascertain which establishments sell tobacco products to minors. For each compliance check, DMH engaged the services of an adult agent and a minor under the age of 18 years. The minor entered an establishment and requested to purchase a tobacco product. If asked his or her age, the minor responded truthfully. If asked for identification, the minor produced a document that accurately reflected his or her age or responded that he or she did not possess any identification, if that were in fact the case. At no time during any compliance check did the minor misrepresent his or her age to the establishment. The adult agent who accompanied the minor to the establishment location recorded the result of each purchase attempt. These compliance checks in cooperation with the FDA ceased on March 21, 2000, when the United States Supreme Court declared that the FDA lacked any authority to regulate the sale or delivery of tobacco products.

14. Between January 1, 1998, and March 21, 2000, DMH conducted a total of 8,289 compliance checks in the State of Missouri, of which 2,320 or 28% resulted in illegal sales of tobacco to a minor.

The Missouri Merchandising Practices Act

15. Section 407.020, RSMo provides, in pertinent part:

The act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in Section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. ... Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during, or after the sale, advertisement or solicitation. [Emphasis added]

16. Section 407.100, RSMo 1994, provides:

1. Whenever it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, the attorney general may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitations, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.

2. In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds or accounts if the court finds that funds or property may be hidden or removed from the state or that such orders or injunctions are otherwise necessary.

3. If the court finds that the person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, it may make such orders or judgments as may be necessary to prevent such person from employing or continuing to employ, or to prevent the recurrence of, any prohibited methods, acts, uses, practices or solicitations, or any combination thereof, declared to be unlawful by this chapter.

* * * * *

6. The court may award to the state a civil penalty of not more than one thousand dollars per violation; except that, if the person who would be liable for such penalty shows, by a preponderance of the evidence, that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed.

7. Any action under this section may be brought in the county in which the defendant resides, in which the violation alleged to have been committed occurred, or in which the defendant has his principal place of business.

17. "Merchandise" is defined by § 407.010(4) as "any objects, wares, goods, commodities, intangibles, real estate or services[.]"

18. "Person" is defined by § 407.010(5) as "any natural person or his legal representative, partnership, firm, for profit or not for profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof[.]"

19. "Sale" is defined by § 407.010(6) as "any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or credit[.]"

20. "Trade" or "commerce" is defined by § 407.010(7) as "the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated. The terms 'trade' and 'commerce' include any trade or commerce directly or indirectly affecting the people of this state."

21. 15 CSR § 60-8.020 defines "unfair practice" as follows:

- (1) An unfair practice is any practice which -
 - (A) Either -

- 1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or

- 2. Is unethical, oppressive or unscrupulous; and

- (B) Presents a risk of, or causes, substantial injury to consumers.

- (2) Proof of deception, fraud or misrepresentation is not required to prove unfair practices as used in section 407.020.1, RSMo.

22. 15 CSR 60-8.090 defines "illegal conduct" as follows:

- (1) It is an unfair practice for any person in connection with the advertisement or sale of merchandise to engage in any method, use or practice which--

- (A) Violates state or federal law intended to protect the public; and

- (B) Presents a risk of, or causes substantial injury to consumers.

Missouri Tobacco Laws

23. Section 407.931.1, RSMo states that, "It shall be unlawful for any person to engage in tobacco product distribution to persons under eighteen years of age."

24. Section 407.931.2, RSMo states in pertinent part that, "No person shall sell any tobacco product or distribute any tobacco product or rolling papers to any minor."

25. The term "distribution" as used in Section 407.931.1, RSMo is defined in Section 407.925(2), RSMo as "a conveyance to the public by sale, barter, gift or sample."

26. The term "tobacco product" as used in Section 407.931.1, RSMo is defined in Section 407.925(10), RSMo as "any substance containing tobacco leaf, including, but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, or dipping tobacco."

27. Section 407.927, RSMo provides:

The owner of an establishment at which tobacco products or rolling papers are sold at retail or through vending machines shall cause to be prominently displayed in a conspicuous place at every display from which tobacco products are sold and on every vending machine where tobacco products are purchased a sign that shall:

(1) Contain in red lettering at least one-half inch high on a white background the following: "It is a violation of state law for cigarettes or other tobacco products to be sold to any person under the age of eighteen"; and

(2) Include a depiction of a pack of cigarettes at least two inches high defaced by a red diagonal diameter of a surrounding red circle, and the words "Under 18".

28. It is the public policy of the State of Missouri that the distribution of tobacco products to minors is unlawful.

29. In the State of Missouri the distribution or sale of tobacco products to minors and the failure to post signs in conformance with § 407.927 are unlawful practices prohibited by Section 407.020.1, RSMo.

COUNT I

Unfair practice by Walgreen Co.

30. The Attorney General incorporates by reference paragraphs 1 through 29 above as if fully set forth herein.

31. Since January 1, 1998, one hundred and fifty (150) compliance checks have been performed at Walgreen stores throughout the State of Missouri. Forty-five (45) of the compliance checks resulted in illegal sales of tobacco products to minors. In other words, 30% of

the compliance checks performed at Walgreen stores in Missouri resulted in illegal sales of tobacco to minors. This rate exceeds the statewide failure rate for all retail establishments for the same period (28%), as well as the nationwide failure rate for Walgreen Co. (26%).

32. On the dates and at the locations indicated below, Walgreen Co. sold and did otherwise distribute tobacco products to persons under the age of 18 years:

Date	Store Location
11/30/98	2002 Missouri Blvd., Jefferson City MO 65109
07/06/99	2110 Tenbrook Rd., Arnold MO 63010
11/17/98	101 Twin City Mall, Crystal City MO 63019
02/20/99	915 Ungermann Rd., St. Peters MO 63376
03/23/99	10042 Gravois Rd., Afton MO 63123
02/06/99	1346 Clarkson Clayton Ctr., Balwin MO 63011
11/08/98	2401 S. Brentwood Blvd., Brentwood MO 63144
10/19/98	220 Chesterfield Mall, Chesterfield MO 63017
11/09/98	12659 Olive Blvd. #3305, Creve Coeur, MO 63141
02/20/99	12661 Olive, Creve Coeur, MO 63141
11/11/98	1144 Meramec Station Rd., Ballwin MO 63021
11/13/99	215 Fenton Park Mall, Fenton MO 63021
12/02/99	577 Howdershell Rd., Florissant MO 63031
02/03/00	577 Howdershell Rd., Florissant MO 63031
12/17/99	1705 Shackelford Rd., Florissant MO 63031
02/03/00	1705 Shackelford Rd., Florissant MO 63031
09/04/99	12400 Old Halls Ferry Rd., Florissant MO 63031
09/04/99	2A Grandview Plaza Shoppint Ct., Florissant MO 63031
11/06/99	9995 Manchester Rd., Kirkwood MO 63122

Date	Store Location
01/22/00	9995 Manchester Rd., Kirkwood MO 63122
02/05/00	441 N. Kirkwood Rd., Kirkwood MO 63122
12/07/98	2024 Dorsett Vlg., Maryland Heights MO 63043
03/02/99	9474 Lackland Rd., Overland MO 63114
11/13/98	1 N. Oaks Plaza, St. Louis MO 63121
09/07/99	1 N. Oaks Plaza, St. Louis MO 63121
02/12/00	5545 Oakville Shopping Ctr., St. Louis MO 63129
09/10/99	12101 Manchester Rd., St. Louis MO 63131
11/08/98	630 N. McKnight Rd., St. Louis MO 63132
02/03/00	630 N. McKnight Rd., St. Louis MO 63132
03/22/99	9285 Jennings Station Rd., St. Louis MO 63136
11/10/98	10403 W. Florissant Ave., St. Louis MO 63136
10/08/99	10403 W. Florissant Ave., St. Louis MO 63136
10/30/99	2310 McCausland Ave., St. Louis MO 63143
07/09/99	905 Olive St., St. Louis MO 63101
02/13/99	4925 Southwest Ave., St. Louis MO 63110
06/26/99	4925 Southwest Ave., St. Louis MO 63110
01/12/99	5550 S. Grand Blvd., St. Louis MO 63116
03/22/99	5550 S. Grand Blvd., St. Louis MO 63116
10/20/98	6411 Gravois Ave., St. Louis MO 63116
01/23/99	6411 Gravois Ave., St. Louis MO 63116
01/12/99	4600 Chippewa St., St. Louis MO 63116
03/23/99	4600 Chippewa St., St. Louis MO 63116
10/07/98	2640 E. Sunshine St., Springfield MO 65804
01/05/99	210 State Highway 165, Branson MO 65616

Date	Store Location
11/03/99	199 N. Florissant Rd., Ferguson MO 63135

33. Walgreen Co. did, therefore, on at least the occasions described above, commit acts which constitute an "unfair practice" that violates § 407.020 RSMo and is enjoined under § 407.100 RSMo.

34. As of May 24, 2000, Walgreen Co. failed to display legally required signs and warnings regarding sale of tobacco products to minors in violation of § 407.927 in at least the following locations:

12659 Olive Blvd. #3305, Creve Coeur, MO 63141
9995 Manchester Rd., Kirkwood MO 63122
630 N. McKnight Rd., St. Louis MO 63132
4925 Southwest Ave., St. Louis MO 63110
5550 S. Grand Blvd., St. Louis MO 63116
6411 Gravois Ave., St. Louis MO 63116
4600 Chippewa St., St. Louis MO 63116
2640 E. Sunshine St., Springfield MO 65804
2002 Missouri Blvd., Jefferson MO 65109

35. Walgreen Co. is, therefore, in at least the locations described above, committing acts which constitute an "unfair practice" that violates § 407.020 RSMo and is therefore enjoined under § 407.100 RSMo.

36. Walgreen Co. benefits financially from the illegal sales of tobacco to minors committed by its employees and agents.

37. Walgreen Co. has failed to take reasonable measures to prevent its employees and agents from selling tobacco products to minors.

38. Walgreen Co.'s failure has resulted in the commission of at least 53 instances of illegal conduct and unfair practices in violation of § 407.020.

Prayer for Relief

WHEREFORE, the Attorney General respectfully requests that this Court enter an Order:

- a) finding that Walgreen Co. committed an unfair trade practice in violation of § 407.020 on 45 separate occasions since January 1, 1998, by selling tobacco products to minors;
- b) finding that Walgreen Co. committed unfair trade practices in violation of § 407.020 by failing to implement reasonable measures designed to prevent the illegal sale of tobacco products to minors at its stores;
- c) finding that Walgreen Co. committed an unfair trade practice in violation of § 407.020 on 45 separate occasions since January 1, 1998, by engaging in tobacco product distribution to persons under eighteen years of age;
- d) finding that Walgreen Co. is committing an unfair trade practice in violation of § 407.020 in at least nine of its locations in Missouri by failing to display the legally required signs and warnings regarding sale of tobacco products to persons under eighteen years of age in violation of § 407.927;
- e) directing that Walgreen Co. shall, pursuant to Section 407.130, RSMo, pay to the State of Missouri, in addition to normal court costs, the cost of the investigation and prosecution of this action;

- f) assessing civil penalties against Walgreen Co. pursuant to § 407.100 in such amount as the Court shall deem appropriate;
- g) permanently enjoining Walgreen Co. from selling tobacco to minors;
- h) directing that Walgreen Co. bring each and every one of its Missouri stores into compliance with the signage requirements of § 407.927;
- i) directing that Walgreen Co. shall be deemed to have given its consent to future contacts between representatives of the Attorney General's office or the DMH and Walgreen Co.'s agent/employees regarding the sale of tobacco products to minors;
- j) indicating that any violation of the Court's order shall be subject to a civil penalty of not more than \$5,000.00 plus payment, in addition to normal court costs, of the cost of the investigation and prosecution of the violation.
- k) any other relief this Court deems fair and reasonable.

Respectfully submitted,

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